

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**October 13, 2004**

IN RE:	)	
	)	
PETITION OF BELL SOUTH	)	DOCKET NO.
TELECOMMUNICATIONS, INC. FOR	)	03-00391
EXEMPTION OF CERTAIN SERVICES	)	

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**ORDER GRANTING IN PART BELL SOUTH TELECOMMUNICATIONS, INC.'S  
SECOND MOTION TO COMPEL RESPONSES TO ITS FIRST SET OF  
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS  
PROPOUNDED TO AT&T OF THE SOUTH CENTRAL STATES, LLC**

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On June 16, 2003 BellSouth Telecommunications, Inc. ("BellSouth") and Citizens Communications, Inc. filed a *Petition for Exemption of Certain Services* ("Petition") in this docket requesting exemption from regulation of their intraLATA toll service and primary rate ISDN service. AT&T Communications of the South Central States, LLC ("AT&T") was permitted to intervene in this docket by an order entered on December 11, 2003.

This matter is before the Hearing Officer for consideration of *BellSouth Telecommunications, Inc.'s Motion to Compel Responses to Its First Set of Interrogatories and Requests for Production of Documents Propounded to AT&T of the South Central States, LLC* ("First Motion") filed on August 30, 2004 and *BellSouth Telecommunications, Inc.'s Second Motion to Compel Responses to Its First Set of Interrogatories and Requests for Production of Documents Propounded to AT&T of the South Central States, LLC* ("Second Motion") on September 30, 2004.

## **BACKGROUND**

*BellSouth's First Set of Interrogatories and Requests for Production of Documents to AT&T* was not filed with the Authority. *AT&T of the South Central States, LLC Responses to BellSouth Telecommunications Inc.'s First Set of Interrogatories and Requests for Production of Documents* ("Response") was filed on August 16, 2004. *AT&T of the South Central States, LLC Supplemental Responses to BellSouth Telecommunications Inc.'s First Set of Interrogatories and Requests for Production of Documents* ("Supplemental Response") was filed on September 27, 2004.

In its *First Motion* BellSouth objected to AT&T's responses to Interrogatory Nos. 3 through 13 and sought to compel responses to Interrogatory Nos. 3, 4, and 5. In its *Second Motion* BellSouth objected to AT&T's supplemental responses to Interrogatory Nos. 1 through 5 and sought to compel responses to each. The relevant portions of BellSouth's interrogatories, AT&T's answers, and the positions of the parties with respect to each are set forth below:

### **BellSouth Interrogatory No. 1:**

Please identify each fact witness you intend to present in this docket and, for each, please state:

- a) the subject or subjects upon which the witness will testify;
- b) the basis of the witness' personal knowledge of the matter regarding which witness will testify; and
- c) all facts of which the witness is aware that support the witness' testimony.

### **BellSouth Interrogatory No. 2:**

Please identify each expert witness you intend to present in this docket and, for each, please state:

- a) the subject or subjects upon which the expert will testify;

- b) the basis for your assertion that the witness is qualified as an expert including, but not limited to, a current curriculum vitae;
- c) all tests, studies, measurements, experiments, or other analysis or actions performed or observed by the expert relating to the expert's testimony;
- d) all opinions that the expert will present in this docket and the basis for each opinion; and
- e) all facts of which you or the expert are aware that support those opinions.

**BellSouth Interrogatory No. 3:**

Please state whether you will contend in this docket that PRI service is not sufficiently competitive in Tennessee to qualify for exemption under T.C.A. § 65-5-208(b), and if you will contend such, state all bases upon which you will make such contention, and all facts which you believe support such contention.

**BellSouth Interrogatory No. 4:**

Please state whether you agree that competition for PRI services in Tennessee is an effective regulator of price for PRI service, and if you do not agree, please state why you do not agree and all facts that you believe support your position.

**BellSouth Interrogatory No. 5:**

Please identify all ways in which you believe exempting PRI service from tariff requirements would cause harm to any end-user in Tennessee and for each way identified, please explain:

- a) the basis for your belief;
- b) any example of such harm being caused anywhere else in the United States;
- c) how likely you believe that harm would be to occur.

**AT&T's Answer to Interrogatory No. 1**

In its *Response* AT&T fully responded to subparts (a) and (b). Regarding subpart (c) stated: "The information requested by BellSouth in this question will be made available to all

parties when AT&T files its direct and rebuttal testimony. AT&T objects to providing this information prior to that time.”<sup>1</sup>

AT&T’s answer to Interrogatory No. 1 in its *Response* served as its answer to Interrogatory Nos. 2 through 5 as well.<sup>2</sup> AT&T did not alter its answers to Interrogatory Nos. 1 through 5 in its *Supplemental Response*.

## **POSITIONS OF THE PARTIES**

In its *First Motion* BellSouth objected to AT&T’s answers to Interrogatory Nos. 3, 4 and 5 stating:

In order to prepare its case in this docket, BellSouth is entitled to know whether this fact will be disputed, particularly in light of the fact that, in the earlier segment of this docket addressing intraLATA toll, there was no factual dispute regarding the competitive nature of that service. . . . Discovery and testimony are two different things. If it were sufficient to respond to discovery by saying merely, “See testimony to be provided later,” which is basically what AT&T has done, then discovery would be rendered utterly useless.<sup>3</sup>

In its *Second Motion* BellSouth objected to AT&T’s answers to Interrogatory Nos. 1 through 5 and stated:

Obviously, all relevant discovery requests relate to matters which may also be contained in a party’s testimony. If parties were permitted to simply say “I’ll give it to you in my testimony” rather than answering discovery, no discovery would ever be answered. In this case, in particular, AT&T’s response is especially problematic. BellSouth, as a petitioner in this docket, will be arguing that PRI service is sufficiently competitive to merit exemption under the statute. All of the other parties in the docket are, therefore, well aware of the general substance of BellSouth’s testimony. BellSouth, on the other hand, is at a disadvantage with respect to the intervenors, as it is unclear what contentions they will be making in this docket. BellSouth fashioned its first round of discovery in an effort to obtain information about the general contentions these intervenors would be making in this docket. BellSouth intended for its second round of discovery to follow up, with respect to those contentions, to obtain specific information about the basis for those contentions. AT&T’s refusal to provide answers to the first round of

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<sup>1</sup> *Response*, p. 3 (August 16, 2004)

<sup>2</sup> *Response*, pp. 4-5 (August 16, 2004)

<sup>3</sup> *First Motion*, pp. 2-4 (August 30, 2004).

discovery has thwarted that process. Intervenor's are not permitted to simply sit by the sideline and editorialize. When a party intervenes to participate in a docket, it must participate fully. That means it must participate in discovery, so that other parties have a fair opportunity to gather facts in order to respond to the contentions or arguments offered by intervenors. . . . AT&T's assertion that it should be permitted to address these matters as part of its testimony, instead of responding to discovery, defeats the purpose of discovery. BellSouth is entitled to discover the general contentions parties intend to make in a contested case in order to obtain the factual basis for those contentions as well as the facts related to those contentions, but not supporting such contentions.<sup>4</sup>

In its *Response* AT&T offered general objections to BellSouth's interrogatories but did not specify which of its general objections applied to Interrogatory Nos. 1 through 5.<sup>5</sup> AT&T answered Interrogatory Nos. 2 through 5 by referring to its answer to Interrogatory No. 1 which, as noted above, included the following statement: "The information requested by BellSouth in this question will be made available to all parties when AT&T files its direct and rebuttal testimony. AT&T objects to providing this information prior to that time."<sup>6</sup> AT&T did not offer additional answers or objections to Interrogatory Nos. 1 through 5 in its *Supplemental Response*.

### **DISCUSSION AND ANALYSIS**

Authority Rule 1220-4-2-10 directs that discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure ("TRCP") when informal discovery is not practicable.<sup>7</sup> TRCP 26.02 permits discovery through various means, including written interrogatories, and allows a party to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."<sup>8</sup> Tennessee Courts have broadly construed the phrase "relevant to the subject matter involved in

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<sup>4</sup> *Second Motion*, pp 1-2, 4-5 (September 30, 2004).

<sup>5</sup> *Response*, pp 1-2 (August 16, 2004).

<sup>6</sup> *Response*, p. 3 (August 16, 2004)

<sup>7</sup> Tenn Comp. R. & Regs 1220-4-2- 10

the pending action” to have a distinct meaning during the discovery stage of a case and to include as “relevant” any matter that bears on, or that reasonably could lead to a matter that bears on, issues and potential issues in the case.<sup>9</sup>

TRCP 26.02 permits a court to limit discovery if:

(i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.<sup>10</sup>

TRCP 37.01 permits a party to file a motion to compel answers to interrogatories where responses are evasive or incomplete.<sup>11</sup> “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”<sup>12</sup>

**BellSouth Interrogatory Nos. 1 through 5.**

The Hearing Officer finds that AT&T’s objections to BellSouth Interrogatory Nos. 1(c) and Interrogatory Nos. 2 through 5 are without merit and its responses thereto insufficient. The basis of any opposition AT&T may have regarding the relief sought through BellSouth’s *Petition* is relevant to the subject matter of this case under the legal standards discussed above. A party is not entitled to shield the basis of any opposition it may have to a request for relief at issue in a

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<sup>8</sup> Tenn. R. Civ. P. 26.02(1).

<sup>9</sup> “Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase ‘relevant to the subject matter involved in the pending action’ has been construed ‘broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.’” *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed2d 253 (1978)).

<sup>10</sup> Tenn. R. Civ. P. 26.02(1).

<sup>11</sup> Tenn. R. Civ. P. 37.01(2).

<sup>12</sup> *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, \*5 n.4 (Tenn. Ct. App. June 27, 2002).

docket merely because it intends to file testimony on the subject at a later time. The effect of exempting PRI service from certain regulatory requirements is a central issue in this docket. Each of these interrogatories bears on, or reasonably could lead to a matter that bears on, this central issue.<sup>13</sup>

The procedural schedule in this docket does not provide for a round of discovery requests to follow the filing of direct testimony. Further, the time between the filing of direct testimony and the date of the Hearing amounts to just over one month.<sup>14</sup> In a typical pleading cycle the petitioner would become aware of the bases for opposition to its requested relief upon the filing of a response. In this case there was no such responsive pleading. BellSouth has demonstrated that it will be prejudiced if it were forced to await the filing of testimony in this docket to receive answers to Interrogatory Nos. 1(c) and Interrogatory Nos. 2 through 5.

Based on the foregoing analysis the Hearing Officer finds that AT&T should supplement its responses to Interrogatory No. 1(c) and Interrogatory Nos. 2, 3, 4 and 5 in their entirety.

**BellSouth Interrogatory Nos. 8 through 13**

BellSouth did not seek to compel answers to Interrogatory Nos. 8 through 13 in its *First Motion* and did not refer to them at all in its *Second Motion*. Consequently, the Hearing Officer makes no findings regarding these interrogatories.

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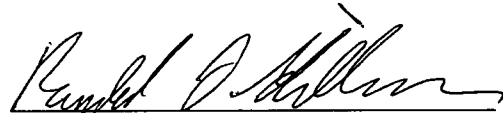
<sup>13</sup> This finding is consistent with previous Authority decisions regarding “contention discovery.” See *In Re Petition of Tennessee American Water company to Change and Increase Certain Rates and Charges so as to Permit It to Earn a Fair and Adequate Rate of Return on its Property Used and Useful In Furnishing Water Service to Its Customers*, Docket No. 03-00118, *Order Granting Motions to compel in Part and Denying in Part*, p 5 (April 25, 2003). See also *In Re Petition of MCI WorldCom, Inc to Enforce Interconnection Agreement with BellSouth Telecommunications, Inc*, Docket No. 99-00662, *Order Granting in Part and Denying in Part BellSouth Telecommunications, Inc 's Motion to Compel*, p 5 (September 1, 2000)

<sup>14</sup> *Order Amending Procedural Schedule*, p. 2 (July 30, 2004)

**IT IS THEREFORE ORDERED THAT:**

1. *BellSouth Telecommunications, Inc. 's Second Motion to Compel Responses to Its First Set of Interrogatories and Requests for Production of Documents Propounded to AT&T of the South Central States, LLC* is granted in part as set forth herein. *BellSouth Telecommunications, Inc 's Motion to Compel Responses to Its First Set of Interrogatories and Requests for Production of Documents Propounded to AT&T of the South Central States, LLC* is moot because the relief it seeks has been granted with this Order.

2. AT&T shall timely supplement its responses to Interrogatory No. 1(c) and Interrogatory Nos. 2, 3, 4 and 5 in their entirety on or before 2:00 p.m., Wednesday, October 20, 2004.

  
Randal L. Gilliam, Hearing Officer